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Electronically Filed August 15, 2017

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re

BISHOP GORMAN DEVELOPMENT  
CORPORATION, a Nevada nonprofit  
corporation,

Debtor.

Case No. BK-S-17-11942-abl

Chapter 11

**AMENDED MOTION PURSUANT TO 11  
U.S.C. §§ 105(a) AND 1121(d), FED. R.  
BANKR. PROCEDURE 9014 AND  
LOCAL RULE 9014 FOR AN ORDER  
EXTENDING THE DEBTOR'S  
EXCLUSIVE PERIODS WITHIN WHICH  
TO FILE A PLAN AND TO SOLICIT  
ACCEPTANCES THERETO**

Hearing Date: September 20, 2017

Hearing Time: 1:30 p.m. (PT)

Bishop Gorman Development Corporation ("BGDC" or "Debtor"), debtor and debtor in possession in the above-captioned chapter 11 case (the "Chapter 11 Case"), hereby submits this amended motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to sections 105(a) and 1121(d) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code"), Rule 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Rule 9014, extending the periods during which only the Debtor may file a chapter 11 plan (the "Exclusive Filing Period") and solicit acceptances thereto

(the “Exclusive Solicitation Period” and, together with the Exclusive Filing Period, the “Exclusivity Periods”). This Motion is made and based upon the following memorandum of points and authorities, the Declaration of Deacon Aruna Silva (the “Silva Declaration”) filed in support hereof, the papers and pleadings on file with the Court in this Chapter 11 Case, judicial notice of which is respectfully requested under Bankruptcy Rule 9017 and Federal Rule of Evidence 201, and any oral arguments the Court may entertain at the hearing on the Motion.

DATED this 15<sup>th</sup> day of August 2017.

**FOX ROTHSCHILD LLP**

By: /s/ Athanasios E. Agelakopoulos  
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**I.**

**JURISDICTION AND VENUE**

This Court has jurisdiction to consider this motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and 157(b)(2)(L). Official Comm. Of Unsecured Creditors v. Henry Mayo Newhall Mem’l Hosp. (In re Henry Mayo Newhall Mem’l Hosp.), 282 B.R. 444, 448 (B.A.P. 9th Cir. 2002) (observing that, “Adjustment of exclusivity under § 1121(d) is a ‘core proceeding’ plan confirmation matter that a bankruptcy judge may hear and determine” under 28 U.S.C. § 157(b)(2)(L).).

Venue of the Debtor’s Chapter 11 Case in this District is proper pursuant to 11 U.S.C. §§ 1408 and 1409.

The statutory bases for the relief requested herein are Bankruptcy Code §§ 105(a), and 1121(d), Bankruptcy Rule 9014, and Local Rule 9014.

1 **II.**

2 **STATEMENT OF FACTS**

3 1. On April 17, 2017 (the “Petition Date”), Debtor filed with this Court a voluntary  
4 petition for relief under chapter 11 of the Bankruptcy Code. (ECF No. 1). Debtor continues to  
5 manage its property and operate its business as debtor in possession pursuant to Bankruptcy Code  
6 sections 1107 and 1108.

7 2. No bankruptcy case trustee or examiner has been appointed in Debtor’s Chapter 11  
8 Case. (See Docket). No statutory committees have been formed or appointed in Debtor’s Chapter  
9 11 Case. (Id.).

10 3. The factual background relating to Debtor’s commencement of the Chapter 11 Case  
11 is set forth in detail in *the Omnibus Declaration of Deacon Aruna Silva in Support of First Day*  
12 *Motions and Related Relief*, which is incorporated herein by this reference. (ECF No. 13). The bar  
13 date for filing non-governmental proofs of claim in the Chapter 11 Case has been set for August 23,  
14 2017 (the “Bar Date”). (ECF No. 2).

15 4. On the Petition Date, Debtor filed several First Day Motions to address various case  
16 administration matters at the outset of the Chapter 11 Case. (See ECF Nos. 10-12). Among these  
17 were Debtor’s motions to maintain its cash management system and Debtor’s motion for  
18 authorization to use cash collateral. (ECF Nos. 11-12).

19 5. J.A. Tiberti Construction, Inc. (“JATCO”) opposed both Debtor’s cash collateral and  
20 cash management motions. (ECF Nos. 29 and 31). JATCO opposed Debtor’s motion for use of  
21 cash collateral, in part, by claiming, “The simple reality is JATCO holds a valid recorded judgment  
22 and lien in real and personal property, and is BGDC’s *largest* secured creditors in this case. BGDC  
23 needs to address JATCO’s claim.” (ECF No. 29; pg. 7 of 31; lines 7-9) (emphasis in original). In  
24 addition, JATCO argued that the cash collateral Debtor sought to use was JATCO’s cash collateral,  
25 not the collateral of Bank of America, N.A. (the “Bank”). (Id. at lines 13-14).

26 6. Similarly and as part of JATCO’s opposition to Debtor’s cash management motion,  
27 JATCO argued, “The reality, however, is that JATCO is a secured creditor by virtue of its Judgment  
28 lien for no less than \$28,749,663.34 and pursuant to the Garnishment Order, senior in position to

1 the Bank in the \$5,410,128 of Garnished Funds, less the approximate amount of \$135,000.” (ECF  
2 No. 31; pg. 4 of 6; ¶ 3; lines 6-9).

3 7. Debtor ultimately obtained authority to use cash collateral through a stipulation  
4 entered into by Debtor, the Bank, the Roman Catholic Bishop of Las Vegas, and His Successors, A  
5 Corporation Sole (the “Diocese”), and JATCO. (ECF Nos. 50, 51, and 54). On May 2, 2017, an  
6 order was entered by the Bankruptcy Court approving Debtor’s cash management motion. (ECF  
7 No. 52).

8 8. On May 17, 2017, Debtor filed a series of applications and corresponding  
9 evidentiary support to retain and employ various estate professionals under 11 U.S.C. § 327 and  
10 Bankruptcy Rule 2014. (ECF Nos. 76, 77, 78, 85, 86, 87, 89, 90, and 91). Also on May 17, 2017,  
11 Debtor filed its schedules and statement of financial affairs with the Bankruptcy Court. (ECF Nos.  
12 80 and 81). Debtor also filed on that date a motion seeking authorization to obtain post-petition  
13 financing under 11 U.S.C. § 364. (ECF No. 93).

14 9. On May 31, 2017, JATCO objected to Debtor’s motion seeking authority to obtain  
15 post-petition financing. (ECF No. 105). In response to JATCO’s objection, Debtor and its post-  
16 petition lender, Service Campaign Corporation (“SCC”), limited SCC’s distribution priority to that  
17 available under 11 U.S.C. § 364(b) and reduced the post-petition financing SCC would make  
18 available to Debtor from \$800,000.00 to \$500,000.00. (See ECF No. 111).

19 10. On June 13, 2017, Debtor filed its application to retain and employ FTI Consulting,  
20 Inc (“FTI”) under 11 U.S.C. § 327 and Bankruptcy Rule 2014(a). (ECF Nos. 116-117). The  
21 hearing on Debtor’s application to retain and employ FTI was set for July 26, 2017. (ECF No. 118).

22 11. On June 14, 2017, hearings were held by the Bankruptcy Court on Debtor’s  
23 applications to retain and employ various estate professionals (with the exception of FTI), as well as  
24 on Debtor’s motion to obtain post-petition financing under 11 U.S.C. § 364(b). As part of the  
25 Bankruptcy Court’s status hearing on that in the Chapter 11 Case, JATCO advised the Bankruptcy  
26 Court that it would oppose any request by Debtor to extend the exclusivity period under 11 U.S.C. §  
27 1121(d).  
28

12. Following the hearings held on June 14, 2017, the Debtor obtained orders from the Bankruptcy Court authorizing the retention and employment of various estate professionals under 11 U.S.C. § 327 and Bankruptcy Rule 2014. (ECF Nos. 133-135). Debtor's motion to obtain post-petition financing was also granted by the Bankruptcy Court. (ECF No. 152).

13. On July 11, 2017 Debtor initiated an adversary proceeding against JATCO that seeks multiple forms of relief, including claims under 11 U.S.C. §§ 362, 547, 549, 551, and 502(d) (the "JATCO Adversary"). (ECF No. 144; Adv. No. 17-01211—ABL; AECF No. 1). The factual recitations set forth in Debtor's adversary complaint against JATCO are hereby incorporated by the reference as if fully set forth herein and shall not be repeated here. (ECF No. 144; AECF No. 1).

14. On July 12, 2017, JATCO objected to Debtor's application to retain and employ FTI. (ECF No. 145). Also on that same date, Debtor filed its monthly operating report for May 2017 and an amended version of its operating report for April 2017. (ECF Nos. 146-147). Amended version of Debtor's schedules and statement of financial affairs were also filed on July 12, 2017. (ECF Nos. 148-149).

15. On July 17, 2017, Debtor, the Bank, the Diocese, and JATCO stipulated to Debtor's continued use of cash collateral through and including October 15, 2017. ((ECF Nos. 153-154).

16. On July 19, 2017, Debtor filed its reply and declarations in support of its application to retain and employ FTI. (ECF Nos. 157-159).

17. On July 21, 2017, Debtor filed its monthly operating report for June 2017. (ECF No. 161).

18. On July 26, 2017, the Bankruptcy Court entertained Debtor's application to retain and employ FTI and JATCO's opposition thereto. In addition, the Bankruptcy Court held a continued status hearing. JATCO once again advised the Court that it would object to a request by Debtor to extend the exclusivity period under 11 U.S.C. § 1121(d).

19. As the foregoing recitation of facts illustrates, JATCO has consistently objected to and attempted to thwart Debtor's case administration and reorganization efforts.

20. At the status hearing held on July 26, 2017, the Bankruptcy Court observed in connection with setting a follow-up status conference in the Chapter 11 Case that case

administration matters were progressing sufficiently well such that a continued status hearing in the case would be set further out than otherwise would have been the case, with the continued status conference set to run concurrently with the scheduling conference in the JATCO Adversary on November 14, 2017. (See ECF No. 163).

21. Also on July 26, 2017, JATCO filed in the JATCO Adversary its answer to Debtor's adversary complaint, as well as a motion for partial summary judgment on Counts III-VI of Debtor's adversary complaint. (AECF Nos. 6-7).

22. On August 2, 2017, the Bankruptcy Court entered an order granting Debtor's application to retain and employ FTI. (ECF No. 166).

23. Debtor's monthly operating reports demonstrate that Debtor's business operations continue to generate revenue. (See ECF Nos. 146-147 and 161).

24. Debtor is current with respect to its obligation to pay quarterly U.S. Trustee fees.

### III.

#### SUMMARY OF ARGUMENT

##### A. Cause Exists under § 1121(d) for Extension of Exclusivity Periods

25. Pursuant to Bankruptcy Code 1121(b) & (c), the Debtor's initial Exclusive Filing Period runs through and including August 15, 2017, while Debtor's Exclusive Solicitation Period runs through and including October 14, 2017.

26. Debtor requests an extension of the Exclusive Filing Period to the earlier of 60 days after the Court enters a final order adjudicating the claims raised in the JATCO Adversary or October 17, 2018, and an extension of the Exclusive Solicitation Period to the earlier of 120 days after the Court enters a final order adjudicating the claims raised in the JATCO Adversary or December 17, 2018, without prejudice to Debtor's right to seek further extensions if circumstances in the Chapter 11 Case warrant and only to the extent otherwise permissible under § 1121.

27. The Motion presents Debtor's first request for an extension of the Exclusivity Periods under § 1121(d). Debtor's request for an extension is narrowly tailored in that, in the first instance, it is linked expressly to the resolution of the JATCO Adversary. Issues of claims allowance and distribution priority as to JATCO's claims are squarely raised in the JATCO

1 Adversary and must be resolved prior to Debtor being in a position to propose and file a plan that  
2 meets all of the requirements for plan confirmation under § 1129(a). Resolution of the JATCO  
3 Adversary in favor of Debtor and its estate will clear the path to Debtor proposing and filing a  
4 confirmable chapter 11 plan of reorganization. As JATCO itself has observed, Debtor needs to  
5 address JATCO's claim. Debtor has now begun the process of doing so through the JATCO  
6 Adversary.

7 28. Denial of the Motion would amount to a forfeiture or reduction of Debtor's initial  
8 period of exclusivity and would reward JATCO's efforts to impermissibly elevate the distribution  
9 priority of its alleged claims at the expense of other holders of general unsecured claims. JATCO  
10 would have accomplished all of this without having to meet the heavy burden that is ordinarily  
11 assigned to a movant seeking to reduce a debtor's initial period of exclusivity. This is so because,  
12 although § 1121(b) granted Debtor an initial period of exclusivity in which Debtor alone could  
13 propose and file a chapter 11 plan, JATCO's prepetition efforts to improve impermissibly its  
14 position relative to other general unsecured creditors in this case and to distort the Bankruptcy  
15 Code's prescribed distribution priorities in its favor has effectively deprived Debtor of the  
16 opportunity to do so as Congress mandated.

17 29. For instance and just by way of example, one of the mandatory elements of a chapter  
18 11 plan is that it designate appropriately classes of claims. See, e.g., 11 U.S.C. §§ 1122(a) and  
19 1123(a)(1). The governing law of this Circuit generally provides that secured creditors are entitled  
20 to be classified separately under a chapter 11 plan. See, e.g., Brady v. Andrew (In re Commercial  
21 W. Fin. Corp.), 761 F.2d 1329, 1338 (9th Cir. 1985). Section 1122(a), in turn, requires substantially  
22 similar claims to be placed in the same class. Tabling the issue of allowance of JATCO's claims for  
23 a moment, resolution of the distribution priority to which JATCO's claims would otherwise be  
24 entitled would be essential, therefore, to Debtor's ability to satisfy the requirements of, among other  
25 confirmation requirements, 11 U.S.C. §§ 1122 and 1129(a)(1). Because this status, among other  
26 issues involving JATCO's claim, remains to be determined in the JATCO Adversary, Debtor has  
27 been hamstrung in its efforts to propose and file a plan that meets all of the requirements § 1129(a).



1 Viewed appropriately, JATCO's stated opposition to Debtor's request for an extension of  
 2 exclusivity amounts to nothing more than impermissible bootstrapping, pure and simple.

3 30. Perhaps most importantly, JATCO's refusal to relinquish its alleged judgment liens  
 4 obtained during the ninety-day period immediately preceding Debtor's bankruptcy case that are  
 5 subject to avoidance in the JATCO Adversary under 11 U.S.C. §§ 547 and 549 has triggered the  
 6 operation of 11 U.S.C. § 502(d) which mandates disallowance of JATCO's claims in their entirety  
 7 under this Circuit's governing law. See El Paso v. Am. W. Airlines, Inc. (In re Am. W. Airlines,  
 8 Inc.), 217 F.3d 1161, 1166 (9th Cir. 2000) (stating, "El Paso has refused to relinquish its assertion of  
 9 the purported validity of its statutory lien; therefore, El Paso's Claim shall be disallowed *in its*  
 10 *entirety* by operation of section 502(d)...") (internal quotation marks omitted) (emphasis added).

11 31. JATCO's characterization of the result mandated by the plain meaning of § 502(d)  
 12 and the Ninth Circuit's authoritative construction of the same in America West Airlines, namely the  
 13 disallowance of JATCO's claims in their entirety as part of the JATCO Adversary as a result of  
 14 JATCO's refusal to relinquish its liens and other security interests that are avoidable under §§ 547  
 15 and 549, as "an absurd, irrational, and ultimately impossible result" is unfortunate. (AECF No. 7;  
 16 pg. 4 of 16; lines 5-6). More problematic still is that JATCO's inclusion of such arguments as part  
 17 of a claim-dispositive motion invites the Bankruptcy Court to commit reversible error without the  
 18 benefit of any discussion at all by JATCO with respect to, or any effort on JATCO's part to  
 19 distinguish, this controlling authority.

20 32. Indeed, the very argument that JATCO advances as part of its motion for partial  
 21 summary judgment on Debtor's claims under § 502(d) against JATCO in the JATCO Adversary  
 22 was expressly considered and rejected by the America West Airlines Court. JATCO argues,  
 23 "Because there is nothing for BGDC to recover under Section 550, Section 502(d) is inapplicable."  
 24 (AECF No. 7; pg. 15 of 16; lines 15-16). In contrast, the America West Airlines Court stated, "The  
 25 applicability of § 550, however, is irrelevant because America West is not attempting to recover  
 26 property affirmatively under § 550. Only the applicability of § 502(d) is at issue."

27 33. Similarly, JATCO's reliance on the statutory term "unless" in § 502(d) in its motion  
 28 for partial summary judgment was dismissed by the Ninth Circuit in America West Airlines as



1 being directly foreclosed by the plain meaning of § 502(d). In re Am. W. Airlines, 217 F.3d at  
 2 1165-1166 (stating, “This argument misconstrues the plain meaning of the statute...The use of the  
 3 word ‘unless’ indicates that the phrase is not an additional requirement for disallowance, but an  
 4 exception to the general rule that a claim based on an avoidable transfer must be disallowed.”)  
 5 (emphasis added). As the Ninth Circuit observed, the exception exists because, “if the transferee  
 6 has already relinquished the avoidable transfer, there is no need to disallow the claim.” Id. Here, §  
 7 502(d) requires disallowance of JATCO’s claims as it has not relinquished avoidable transfers.

8 34. Either disallowance of JATCO’s claim in its entirety or its proper classification as a  
 9 general unsecured claim would enable Debtor to propose and file a confirmable chapter 11 plan of  
 10 reorganization. And Debtor should not be denied its initial opportunity to do so due to JATCO’s  
 11 refusal to relinquish avoidable transfers.

12 35. As discussed and demonstrated below, an examination of the factors identified in the  
 13 case law that provides the prevailing construction of § 1121(d) in this Circuit establishes that cause  
 14 exists for the Bankruptcy Court to grant Debtor’s Motion and extend the Exclusivity Periods the  
 15 earlier of the those dates discussed above that are tied directly to the entry of a final order in the  
 16 JATCO Adversary or, in the alternative, the statutory maximum time period under § 1121(d).

#### 17 IV.

#### 18 STATUTORY BASIS FOR RELIEF REQUESTED

19 Section 1121(d) of the Bankruptcy Code provides, in part:

20 [O]n request of a party in interest made within the respective periods  
 21 specified in subsections (b) and (c) of this section and after notice and  
 22 a hearing, the court may for cause reduce or increase the 120-day  
 period or the 180-day period referred to in this section.

23 11 U.S.C. § 1121(d)(1).

24 Here, Debtor’s initial Exclusive Filing period runs through and including August 15, 2017.  
 25 As Debtor’s Motion was filed within the 120-day period provided by §§ 1121(b) and 1121(c),  
 26 Debtor’s Motion is, therefore, timely.

27 ///

28 ///

V.

## ARGUMENT

A. **The Court has Discretion to Extend the Exclusivity Periods For “Cause”.**

The decision to extend exclusivity for cause rests within the Court’s discretion. In re Adelphia Commc’ns Corp., 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006). Although the Bankruptcy Code does not define “cause,” legislative history and case law make it plain that “cause” is a flexible standard. See H.R. Rep. No. 95-595, at 231-32 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6191; see also United Savings Assoc. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 372 n.15 (5th Cir. 1987).

Although the question of “cause” under § 1121(d) is committed to the Bankruptcy Court’s discretion, on appeal determinations of cause are subject to *de novo* review as they present mixed questions of law and fact. (In re Henry Mayo Newhall Mem’l Hosp.), 282 B.R. at 452. Bankruptcy courts typically examine several non-exclusive factors in determining whether there is “cause” to extend exclusivity, including:

- (i) the size and complexity of a debtor’s case;
- (ii) the necessity for sufficient time to permit a debtor to negotiate a plan of reorganization and prepare adequate information;
- (iii) the existence of good faith progress towards reorganization;
- (iv) the fact that a debtor is paying its bills as they become due;
- (v) whether a debtor has demonstrated reasonable prospects for filing a viable plan;
- (vi) whether a debtor has made progress in negotiations with its creditors;
- (vii) the amount of time which has elapsed in the case;
- (viii) whether a debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtors’ reorganization demands; and
- (ix) whether an unresolved contingency exists.

Adelphia, 352 B.R. at 587 (listing all nine factors) (citing In re Dow Corning Corp., 208 B.R. 661, 664-65 (Bankr. E.D. Mich. 1997) (“Dow Corning”). The factors enumerated in Dow Corning are

“standardly considered.” Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Memorial Hosp. (In re Henry Mayo Newhall Memorial Hosp.), 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002). Not all factors, however, are relevant to every case, and courts have found “cause” to extend exclusivity based on various combinations of these factors, as well as others. See, e.g., Rinehart v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.), 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003) (“It is within the discretion of the bankruptcy court to decide which factors are relevant and give appropriate weight to each.”); In re Express One Int’l, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (finding “cause” based on only four factors); In re United Press Int’l, Inc., 60 B.R. 265, 269 (Bankr. D.D.C. 1986) (finding “cause” based on only three factors).

In Henry Mayo, the Ninth Circuit Bankruptcy Appellate Panel affirmed a bankruptcy court’s finding of “cause” based on the following:

(1) a first extension; (2) in a complicated case; (3) that had not been pending for a long time, relative to its size and complexity; (4) in which the debtor did not appear to be proceeding in bad faith; (5) had improved operating revenues so that it was paying current expenses; (6) had shown a reasonable prospect for filing a viable plan; (7) was making satisfactory progress negotiating with key creditors; (8) did not appear to be seeking an extension of exclusivity to pressure creditors; and (9) was not depriving the creditors committee of material or relevant information.

282 B.R. at 452.

**B. Cause Exists to Extend the Exclusivity Periods and to Grant the Motion.**

1. **Debtor’s first request for an extension of the Exclusivity Periods is reasonable given the size, complexity, and duration of Debtor’s Chapter 11 Case; and, JATCO should not be permitted to bootstrap a forfeiture or *de facto* reduction of Debtor’s Exclusivity Periods to the avoidable results of JATCO’s race to the courthouse.**

“It was intended that at the outset of Chapter 11 case a debtor should be given the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors.” See, e.g., (In re Texaco, Inc.), 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (citing legislative history) (citation omitted) (emphasis added). The statutory scheme set forth in § 1121, therefore, defaults to providing Debtor with an initial period of exclusivity under § 1121(b).

Here, Debtor's opportunity to propose and file a chapter 11 plan of reorganization has been neither unqualified nor free from creditor interference from the commencement of the Chapter 11 Case. The results of JATCO's race to the courthouse constitute a continuing form of creditor interference on what would otherwise be Debtor's unqualified right to propose and file a chapter 11 plan of reorganization. JATCO's prepetition efforts to improve its distribution priority vis-à-vis other general unsecured creditors distort the Bankruptcy Code's otherwise applicable priority scheme. The ramifications of JATCO's actions to improve its distribution priority (and that are subject to avoidance in the JATCO Adversary) ripple throughout the Bankruptcy Code and have hindered Debtor's ability to propose and file a confirmable chapter 11 plan of reorganization that meets the requirements of § 1129(a). For instance, pending the outcome of the JATCO Adversary, Debtor is not in a position to classify JATCO's claims with any certainty as either secured or unsecured claims. Resolution of the JATCO Adversary will also shed light on whether JATCO's claims will be disallowed in their entirety under § 502(d).

Debtor's requested extension of the Exclusivity Periods that is tied directly to the resolution of the JATCO Adversary is reasonable and appropriate under the circumstances, and given the relatively short duration, of this Chapter 11 Case. See, e.g., In re Ames Dep't Stores, Inc., 1991 WL 259036, at \*3 (S.D.N.Y. Nov. 25, 1991) ("The purpose of the Bankruptcy Code's exclusivity period is to allow the debtor flexibility to negotiate with its creditors"); Adelphia, 352 B.R. at 586 (exclusivity contemplates the "negotiation of a plan of reorganization that may be acceptable to creditors and other interested parties" (quoting In re Texaco Inc., 81 B.R. 806, 810 (Bankr. S.D.N.Y. 1988))). In Henry Mayo, the Bankruptcy Appellate Panel noted that "a transcendent consideration is whether adjustment of exclusivity will facilitate moving the case toward a fair and equitable resolution." 282 B.R. at 453.

Until the Bankruptcy Court determines the matters presented for adjudication as part of the JATCO Adversary, Debtor will not be in a position to propose and file a chapter 11 plan of reorganization that meets all of the requirements of § 1129(a). As alleged by Debtor in the JATCO Adversary, the results of JATCO's race to the courthouse are avoidable under, among other provisions of the Bankruptcy Code, §§ 547 and 549, and JATCO's refusal to relinquish its

avoidable transfers renders JATCO's claims in the Chapter 11 Case subject to disallowance in their entirety by operation of § 502(d). Either reclassification of JATCO's claims as general unsecured claims or the outright disallowance of JATCO's claims in their entirety by operation of § 502(d) would clear the path for Debtor to propose a confirmable chapter 11 plan of reorganization.

Denial of the Motion, on the other hand, would reward JATCO for engaging in an otherwise impermissible race to the courthouse to improve its distribution priority at the expense of other general unsecured creditors of Debtor's estate. JATCO's efforts would result either in an outright forfeiture of Debtor's initial period of exclusivity in which to propose and file a chapter 11 plan of reorganization or would amount to a reduction of Debtor's initial Exclusivity Periods. If the Motion is denied, JATCO will have achieved a *de facto* reduction of Debtor's initial period of exclusivity without having to meet the heavy burden assigned under the case law to those seeking a reduction of a Debtor's initial period of exclusivity. See, e.g., (In re Texaco, Inc.), 81 B.R. at 812. The Bankruptcy Court should not approve, through denial of the Motion, JATCO's race to the courthouse and improvement of position at the expense of other general unsecured creditors in the Chapter 11 Case and encourage such priority jumping tactics by also negating Debtor's initial ability to propose a confirmable chapter 11 plan of reorganization for consideration and acceptance by its creditors.

Cause for relief under § 1121(d) has, therefore, been established under the first three factors identified in In re Henry Mayo Newhall Memorial Hospital, and the Court should enter an order granting the Motion on this basis alone.

**2. Debtor's good faith efforts in addressing JATCO's claims as part of the JATCO Adversary demonstrate that Debtor has reasonable prospects for confirming a chapter 11 plan, is making satisfactory progress in its efforts to negotiate with key creditors, and is not seeking an extension under § 1121(d) to pressure creditors into accepting a plan that would otherwise be unacceptable to them.**

Debtor promptly initiated the JATCO Adversary at the outset of the Chapter 11 Case in good faith effort to clear hurdles to plan confirmation set in place by JATCO, not to pressure creditors into accepting an otherwise unacceptable chapter 11 plan. See In re McLean Indus., Inc., 87 B.R. 830 (Bankr. S.D.N.Y. 1987) (stating courts may assess conduct during case to determine whether debtor's motives for seeking extension of exclusivity are proper). A successful resolution

1 of the JATCO Adversary would clear Debtor's path to confirmation of a chapter 11 plan of  
 2 reorganization; thus, Debtor has thus far demonstrated that it has a reasonable and viable path  
 3 forward to plan confirmation in the Chapter 11 Case.

4 Cause for relief under § 1121(d) has, therefore, been established under these four factors  
 5 identified in In re Henry Mayo Newhall Memorial Hospital, and the Court should enter an order  
 6 granting the Motion on this basis alone.

7 **3. Debtor is paying its bills as they come due, functioning fully as Debtor in**  
 8 **possession, and is timely sharing information with creditors through its monthly**  
 9 **operating reports, schedules and statement of financial affairs, and its**  
 10 **stipulated cash collateral budgets.**

11 As evidenced by the Debtor's monthly operating reports, Debtor has been meeting its  
 12 ongoing obligations as they come due, therefore, this factor weighs in favor of granting the instant  
 13 motion. The Debtor is an active and effective debtor in possession entitled to retain control over the  
 14 reorganization process. Debtor is also timely sharing information with creditors through its  
 15 monthly operating reports, cash collateral budgets, and filed schedules and statement of financial  
 16 affairs, both original and amended. Thus, these factors identified in the case law construing cause  
 17 under § 1121(d) also weigh in favor of granting the relief requested in the Motion.

18 **4. The preference action is an unresolved contingency that will need to be resolved**  
 19 **before Debtor can propose a plan of reorganization; and, JATCO will not be**  
 20 **prejudiced as a result of the Motion being granted as resolution of the JATCO**  
 21 **Adversary is a necessary condition precedent to any plan JATCO may wish to**  
 22 **proposed in the Chapter 11 Case.**

23 The JATCO Adversary is an unresolved contingency which must be resolved in order to  
 24 formulate Debtor's plan of reorganization. In addition, granting the Motion will not result in any  
 25 prejudice to JATCO because, as a plan proponent under § 1129(a)(2), JATCO must be able to  
 26 determine whether (i) its claims will be disallowed in their entirety under § 502(d) as a result of  
 27 JATCO's refusal to relinquish avoidable transfers, such as its asserted judgment liens, garnishment  
 28 orders, etc. and (ii) how its claims will be classified under a chapter 11 plan. JATCO needs the  
 JATCO Adversary to be resolved prior to JATCO being able to propose and file a confirmable  
 chapter 11 plan. Any delay, therefore, in JATCO's ability to propose a competing plan in the  
 Chapter 11 Case is a problem of JATCO's own making, and JATCO should not now be heard to

1 complain about the delay that its own actions and recalcitrance in refusing to relinquish otherwise  
2 avoidable transfers has visited upon it.

3 For instance and just by way of example, if Debtor is successful in the JATCO Adversary  
4 and obtains disallowance of JATCO's claims under § 502(d), JATCO would not be permitted to  
5 vote on any plan that may be proposed in the Chapter 11 Case as only holders of allowed claims are  
6 permitted to vote on a chapter 11 plan by operation of § 1126, and its is doubtful that, as a holder of  
7 a disallowed claim, JATCO would qualify as a party in interest under § 1121(c), such that JATCO  
8 should be permitted to propose a competing chapter 11 plan in Debtor's bankruptcy case. Indeed,  
9 in light of Debtor's pending objection to JATCO's claims under § 502(d) as part of the JATCO  
10 Adversary, any claims of JATCO in the Chapter 11 Case would not qualify as allowed claims by  
11 operation of § 502(a). These factors also weigh in favor of granting the Motion.

## 12 VI.

### 13 CONCLUSION

14 For all of the foregoing reasons, Debtor respectfully requests that the Court extend the  
15 Exclusive Filing Period through the earlier of 60 days after the Court enters a final order on the  
16 JATCO Adversary or October 17, 2018 and extend the Exclusive Solicitation Period through the  
17 earlier of 120 days after the Court enters a final order on the Adversary Proceeding or December 17,  
18 2018. Debtor also respectfully requests that the Court preserve the Debtor's right to seek further  
19 extensions of the Exclusivity Periods and grant such other relief as the Court deems just and proper.

20 Dated this 15th day of August 2017.

### 21 FOX ROTHSCHILD LLP

22 By: /s/Athanasios E. Agelakopoulos

23 BRETT A. AXELROD, ESQ.

24 Nevada Bar No. 5859

25 ATHANASIOS E. AGELAKOPOULOS, ESQ.

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## **EXHIBIT A**

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**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re

BISHOP GORMAN DEVELOPMENT  
CORPORATION, a Nevada nonprofit  
corporation,

Debtor.

Case No. BK-S-17-11942-abl

Chapter 11

**ORDER GRANTING AMENDED MOTION  
PURSUANT TO 11 U.S.C. §§ 105(a) AND  
1121(d), FED. R. BANKR. PROCEDURE  
9014 AND LOCAL RULE 9014 FOR AN  
ORDER EXTENDING THE DEBTOR'S  
EXCLUSIVE PERIODS WITHIN WHICH  
TO FILE A PLAN AND TO SOLICIT  
ACCEPTANCES THERETO**

Hearing Date: September 20, 2017  
Hearing Time: 1:30 p.m.

The Court, having reviewed and considered the *Amended Motion Pursuant to 11 U.S.C. §§105(a) and 1121(d), Fed. R. Bankr. P. 9014 and Local Rule 9014 for an Order Extending the Debtor's Exclusive Periods Within Which to File a Plan and To Solicit Acceptances Thereto* (the "Motion")<sup>1</sup> (ECF No. ) filed by Bishop Gorman Development Corporation ("BGDC" or "Debtor"), and the Declaration of Deacon Aruna Silva filed in support of the Motion (ECF No. ), pursuant to sections 105(a) and 1121(d) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, Rule 9014 of the Federal Rules of Bankruptcy Procedure and Local Rule 9014 of the Court's Local Rules of Bankruptcy Practice and Procedure; and with good cause appearing therefor:

**IT IS HEREBY ORDERED** that the Motion is GRANTED;

**IT IS HEREBY ORDERED** Debtor has established cause for relief under § 1121(d);

**IT IS HEREBY FURTHER ORDERED** that the Exclusive Filing Period during which only the Debtor may file a plan under Bankruptcy Code § 1121(b) shall be and is hereby extended through the earlier of 60 days after the Court enters a final order on the JATCO Adversary or October 17, 2018;

**IT IS HEREBY FURTHER ORDERED** that the Exclusive Solicitation Period during which only the Debtor may solicit acceptances to a plan under Bankruptcy Code § 1121(c) shall be and is hereby extended through the earlier of 120 days after the Court enters a final order on the Adversary Proceeding or December 17, 2018;

**IT IS HEREBY FURTHER ORDERED** that the extensions of the Exclusivity Periods granted herein shall be without prejudice to the right of the Debtor to request further extensions of the Exclusivity Periods to the extent otherwise permitted under Bankruptcy Code § 1121; and

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

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<sup>1</sup> Capitalized terms used, but not defined, herein shall have the meanings ascribed to such terms in the Motion.

1 PREPARED AND SUBMITTED BY:

2 **FOX ROTHSCHILD LLP**

3 By: /s/Athanasios E. Agelakopoulos

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12 *Counsel for Bishop Gorman Development Corporation*

13 **CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

14 In accordance with Local Rule 9021, counsel submitting this document certifies as follows:

- 15 ☐ The Court has waived the requirement of approval in LR 9021(b)(1).
- 16 ☐ No party appeared at the hearing or filed an objection to the motion
- 17 ☐ I have delivered a copy of this proposed order to all counsel who  
18 appeared at the hearing, any unrepresented parties who appeared at the  
19 hearing, and each has approved or disapproved the order, or failed to  
20 respond, as indicated below:
- 21 ☐ I certify that this is a case under Chapter 7 or 13, that I have served a  
22 copy of this order with the motion pursuant to LR 9014(g), and that no  
23 party has objected to the form or content of the order.

24 ###